**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA** **PLAINTIFFS**

**v.** **CASE NO.: 05-CV-00329 GKF –SAJ**

**TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC.** **DEFENDANTS**

**DEFENDANTS' MOTION TO STRIKE OR EXTEND RESPONSE DEADLINE AND FOR ESTABLISHMENT OF SCHEDULE FOR RESOLVING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc., Cal-Maine Farms, Inc., George's, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc. and Willow Brook Foods, Inc. ("Defendants") move the Court for an order striking or extending the deadline for Defendants to respond to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 1373) and establishing a schedule for Defendants to take discovery and prepare rebuttal expert reports as necessary to respond to the Motion.

## I. Expedited Consideration of Plaintiffs' Motion Would Be Seriously Prejudicial to Defendants and The Court

In their Motion, Plaintiffs ask this Court to enter a sweeping injunction prohibiting by judicial fiat legislatively-authorized conduct occurring in five separate counties located in two different States. The requested injunction would affect the livelihoods of thousands of cattle ranchers, poultry growers and farmers who make lawful use of poultry litter as a fertilizer as part of their farming enterprises but who are not parties to this action. The requested injunction would completely supplant and eviscerate the laws enacted by legislatures in both States and regulatory programs administered by agencies in both States. Simply put, Plaintiffs' request for such sweeping relief from this Court is a serious matter. This Court's decision (whether a grant or a denial of the Motion) will likely be the subject of an immediate interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1) (granting authority for interlocutory review of "orders . . . granting, continuing, modifying, refusing or dissolving injunctions.") Consequently, the interests of all parties and this Court are served by the development of a sufficient record relative to the accusations made and relief sought by Plaintiffs in the Motion.

In support of the Motion, Plaintiffs have put forth through affidavit the opinions of 9 purported "experts" with claimed qualifications in the fields of leisure studies, geochemistry, geology, toxicology, risk assessment, economics, biological engineering, agronomy, microbiology and epidemiology. These experts offer a host of conclusory "scientific opinions"

based on undisclosed information and data.[1] Because Plaintiffs' expert disclosures do not provide the information required by Rule 26(a)(2)(B),[2] Defendants had to request this information from Plaintiffs in written correspondence on November 16, 2007. *See* Ex. A attached hereto, November 16, 2007 Letter to Plaintiffs' Counsel. The information required by Rule 26 has yet to be disclosed and Plaintiffs have yet to respond to the request for that information. In an effort to further discern the basis, if any, for the conclusory opinions offered by Plaintiffs' experts and to discover information necessary to impeach those experts and their opinions, Defendants promptly upon receipt of the Motion served Plaintiffs with written discovery requesting the production of data, maps, documents and materials relevant to the work of these experts. *See* Ex. B attached hereto, Tyson Foods, Inc.'s November 16, 2007 Requests for Production of Documents. Plaintiffs have yet to respond to these discovery requests. The production of the information requested by Defendants is, of course, a necessary prerequisite to depositions of Plaintiffs' experts which must occur before Defendants can submit a response to the Motion supported by their own experts in advance of an evidentiary hearing on Plaintiffs' request for sweeping injunctive relief.

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[1] *See, e.g.,* Ex. 17 to Pltfs. Motion, Aff. of R. Lawrence (concluding that "recreational use of the Illinois River by tens of thousands of people each year places them at an unacceptable risk for exposure to pathogens arising from poultry waste" without disclosing any scientific basis, data or analysis to support that conclusion); Ex. 16 to Pltfs. Motion, Aff. of V. Harwood (concluding that "the fecal bacteria concentrations in the IRW tributaries are not characteristic of those in rural, unimpacted areas, in fact they are similar to those we see in highly impacted urban waters, underscoring the impact of poultry fecal contamination" without disclosing any scientific basis, data or analysis to support that conclusion); Ex. 15 to Plts. Motion, Aff. of R. Olsen (claiming that he has "sourced" contamination in the waters in IRW to poultry litter based on a "definitive poultry waste signature that can be specifically recognized and identified in the environment" but not disclosing or describing what the purported signature is.)

[2] Rule 26(a)(2)(B) mandates that expert disclosures, at a minimum, include a complete statement of all opinions to be expressed by the expert, the basis and reasons for those opinions, all data or information considered by the expert in forming those opinions, any exhibits to be used as a summary of or for support of those opinions, a list of all publications authored by the expert in the preceding 10 years, a list of cases in which the expert has testified in the preceding 4 years and the compensation paid to the expert. Fed. R. Civ. P. 26(a)(2)(B). Plaintiffs' expert affidavits do not comply with Rule 26(a)(2)(B).

To require Defendants to respond to the Motion and defend against it at an expedited evidentiary hearing before conducting full discovery on previously undisclosed expert opinions and analysis would be tantamount to trial by ambush. Defendants have had discovery requests outstanding to Plaintiffs for over a year and one-half now requesting the production of information supporting Plaintiffs' vague references in their complaint to health hazards and their conclusory assertions that Defendants are responsible for bacteria levels (whether harmful or not) in the streams in the IRW. *See* Tyson Foods Interrog. No. 10, attached hereto as Ex. C, (asking for all evidence that supports the allegation that actions of the Tyson Defendants pose a threat to the health of any person in the IRW); Tyson Chicken Interrog. No. 2, attached hereto as Ex. D, (asking for all evidence that supports the allegation that bacteria contamination in the IRW was caused by the actions of the Tyson Defendants). While it is not clear what facts, data or information Plaintiffs' nine experts rely upon to support the 73 pages of affidavits delivered on November 14, 2007, it is clear that all such facts, data or information would be responsive to Defendants' longstanding discovery requests.

Defendants have diligently pursued discovery in an attempt to discern the true nature of and basis of Plaintiffs' claims. Plaintiffs chose to hide behind the attorney work-product doctrine and purported "consulting expert protections" and to withhold information and data which now apparently forms the basis for a preliminary injunction motion for which they demand expedited consideration. Plaintiffs' late-developing claims of an "emergency" and their pleas for expedited consideration are nothing more than a thinly-veiled attempt to deprive Defendants of a meaningful ability to challenge and defend against Plaintiffs' spring-loaded expert attack. This Court should not condone such antics.

## II. Plaintiffs' Assertions of an Emergency Should Be Ignored

Plaintiffs' two and one-half year delay in seeking a preliminary injunction is, of course, the product of their own choices. That delay in and of itself is sufficient grounds for this Court to summarily deny the Motion. *See, e.g., Charlesbank Equity Funds II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) (Plaintiffs' "cries of urgency are sharply undercut by its own rather leisurely approach to the question of preliminary injunctive relief. It waited more than a year after the commencement of the action to seek an injunction. That chronology has evidentiary significance."); *Ty v. The Jones Group,* 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered."); *Majorica, S.A. v. R.H. Macy & Co.,* 762 F.2d 7, 8 (2nd Cir. 1985) ("Lack of diligence, standing alone may preclude granting of preliminary injunctive relief. . . .") Should this Court nevertheless be inclined to seriously entertain Plaintiffs' tardily filed request for a "preliminary" injunction, it should do so under a reasonable and fair pre-hearing schedule. Neither this Court nor the Defendants should be rushed or have their preparations for the hearing compromised by Plaintiffs' self-serving proclamations of an emergency.

Plaintiffs' amazing claim that the "coming spring rains" constitute an emergency which should compel the Court to expedite the consideration of the Motion (*see* Pltfs. Motion for Expedited Status Conference (Dkt. No. 1378) is simply a litigation ploy put forward in hopes of avoiding serious scrutiny of their experts and full consideration of their novel legal and scientific claims. This lawsuit was filed in June 2005. During the course of this lawsuit, Plaintiffs have sat idly by during two different spring seasons (spring 2006 and spring 2007). Farmers used poultry litter to fertilize soils in the IRW and the rains came during both of those years.

Plaintiffs did not seek a preliminary injunction in advance of either of those two spring periods. Plaintiffs posted no swim advisories, nor did they warn residents in the IRW not to drink the water. Moreover, after more than two years of sampling and investigation in the IRW, Plaintiffs have been forced to reluctantly confess that they are unable to identify a single person who has actually been injured as a result of contact with the waters in the IRW. Pltfs. Resp. to Simmons Foods Interrog. No. 5, attached hereto as Exhibit E. Plaintiffs' new found and strategically timed sense of urgency simply lacks credibility.

The fact of the matter is that no emergency exists. That bacteria is found in the waters in the IRW is neither newly discovered evidence nor a public health crisis. Plaintiffs sole evidence of "dangerous" levels of fecal bacteria in the waters in the IRW is the fact that 8 segments "of Flint Creek, Baron Fork Creek and the Illinois River have been designated by the Oklahoma Water Resources Board as 'impaired' due to contamination from fecal bacteria." Pltfs. Prel. Inj. Mot. (Dkt. 1373) p. 7. Plaintiffs have failed to inform the Court of some important facts relative to the fecal bacteria impairment designation. First, this is old news. The stream segments in the IRW were designated as impaired due to fecal bacteria *before* this lawsuit was filed. *See* 2004 OWRB Beneficial Use Monitoring Report, attached hereto as Exhibit F, pp. 261, 267 and 276 (identifying segments of Illinois River, Flint Creek and Barren Fork impaired for primary body contact recreation use due to bacteria concentrations).

Second, fecal bacteria impairment designations are common place in Oklahoma and such designations are not limited to areas where poultry farming occurs. If an impairment designation by OWRB for fecal bacteria constitutes a public health crisis, then virtually no waters in the State of Oklahoma are safe to swim in or drink from. According to Oklahoma's 2006 Water Quality Assessment Report more than 11,886 miles of streams in Oklahoma are impaired due to

fecal bacteria levels. Ex. G, attached hereto, 2006 Water Quality Assessment Integrated Report, p. 11, Table 6 (5,847 miles impaired due to enetrococcus levels, 3,118 miles impaired due to e coli levels and 2,921 miles impaired due to fecal coliform levels). The streams carrying these designations are located throughout Oklahoma and are in no way confined to areas of poultry production Simply put, Plaintiffs have irresponsibly manufactured claims of a public health crisis in hopes that such claims will prompt an emotional decision by this Court to prejudice Defendants' ability to prepare a defense to these claims by placing Plaintiffs' "preliminary" injunction motion on a fast-track to an evidentiary hearing.

## III. Defendants' Scheduling Proposal

Defendants are anxious for the opportunity to dispel Plaintiffs' propaganda and hyperbole in an evidentiary hearing on the Motion. However, Defendants must first be afforded a meaningful opportunity to conduct discovery, prepare expert reports and prepare for the evidentiary hearing.

Defendants implore the Court not to fall for Plaintiffs' antics and respectfully request an opportunity to conduct meaningful discovery into the purported basis for Plaintiffs' motion before filing a response and prior to an evidentiary hearing on that motion. Without knowing more about the true basis, if any, for the multiple conclusory opinions proffered by Plaintiffs' experts, it is difficult to determine the precise contours of an appropriate pre-hearing schedule. Nevertheless, based on what is known at this point, Defendants believe the following represents a reasonable schedule for adjudicating Plaintiffs' motion:

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| Plaintiffs' Disclosure of Rule 26 (a)(2)(B) Information: | November 27, 2007 |
| Production of Documents Requested in Tyson Foods Rule 34 Requests: | December 17, 2007 |
| Depositions of Plaintiffs' Experts: | Prior to March 1, 2008 |

| | |
|---|---|
| Defendants' Response Brief | March 13, 2008 |
| Defendants' Expert Reports (with Rule 26(a)(2)(B) Information): | March 13, 2008 |
| Written Discovery and Depositions of Defendants' Experts: | Prior to April 14, 2008 |
| Plaintiffs' Reply Brief | April 28, 2008 |
| Simultaneous Exchange of Hearing Witness Lists and Exhibits: | May 7, 2008 |
| Evidentiary Hearing (2 weeks) | After May 14, 2008 |

Defendants may need to revise the above proposed schedule after conferring with their experts and are, of course, willing to meet and confer with Plaintiffs about any suggestions or objections they may have with this proposed schedule.

## IV. Conclusion

Defendants respectfully request: (1) that their November 28, 2007 deadline to respond to Plaintiffs' motion under Local Rule 7.2(e) be stricken, (2) that a two-week evidentiary hearing be scheduled on Plaintiffs' Motion in accordance with the Court's docket but no sooner than May 14, 2008, and (3) that the order scheduling the evidentiary hearing include pre-hearing deadlines similar to those proposed in Section III above.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 19th day of November 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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